IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-73

JOHN WRIGHT, d/b/a TOUCH OF CLASS MASSAGE PARLOR; MARY KAY GILBERT; MARY JO KOCHER; KARON GRIFFIN, *et al.*,

Appellants,

vs.

CITY OF INDIANAPOLIS; WILLIAM HUDNUT, as Mayor of the City of Indianapolis; FRED ARMSTRONG, as City Controller of the City of Indianapolis; CONSOLIDATED CITY OF INDIANAPOLIS,

Appellees.

MOTION TO DISMISS OR AFFIRM.

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MOTION TO DISMISS OR AFFIRM.

The appellees, the City of Indianapolis, William Hudnut, as its Mayor, and Fred Armstrong, as its City Controller, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Indiana on the grounds that (i) the appeal is untimely, (ii) the appeal presents no substantial federal question, (iii) most of the federal questions sought to be raised were not expressly passed on by either the trial court or the Indiana Supreme Court and (iv) the questions on which the judgment depends are so unsubstantial as not to need further argument.

I.

STATEMENT OF THE CASE.

In September, 1976, the Indianapolis City-County Council duly enacted General Ordinance No. 110 which established a licensing scheme for massage parlors (the "Ordinance"). The Ordinance makes it unlawful to operate a massage parlor or similar business without a license. In addition, it imposes certain proscriptions on the operation of such businesses, and provides for the revocation of licenses in the event those proscriptions are not obeyed. Finally, it permits inspections to be made by public officials to ensure compliance with the Ordinance.

The Ordinance was passed as a consequence of the activities in and around massage parlors in Indianapolis. During the first nine months of 1976, 51 arrests and summonses were effected as a result of illegal activities taking place at the 13 massage parlors located within the Indianapolis Police Service District. It was scheduled to become effective October 15, 1976, but on October 14, 1976, two of the appellants, an owner of a licensed massage parlor and a licensed massage therapist in Indianapolis, sought and obtained a temporary restraining order from the Marion County Superior Court. On October 25, 1976, an order issued from that court permanently enjoining enforcement of sections 17-729(e), 17-729(j) and 17-727(a)(9) of the Ordinance and declaring them unconstitutional. (Appendix C)

Section 17-729(e) prohibits in licensed massage parlors the administration of any massage, alcohol rub or similar treatment, fomentation, bath or electric or magnetic treatment with certain exceptions to persons of the opposite sex. (Appendix D, p. 8d-9d) Section 17-729(j) provides that every massage parlor must be open for inspection during all business hours and at other reasonable times. (Appendix D, p. 9d) And Section 17-727 (a)(9) requires an applicant for a license to sign an agreement permitting inspection. (Appendix D, p. 7d)

In its order enjoining enforcement of the Ordinance, the Marion County Superior Court held that Section 17-729(e) was unconstitutional since it was an attempted local criminal law prohibited by Article 4, Section 22 and 23 of the Indiana Constitution, and was violative of the due process and equal protection clauses of the Indiana Constitution. Sections 17-729(j) and 17-727(a)(9) were found violative of the search and seizure proscription in the Indiana Constitution, Article I, Section 11, and in the Fourth Amendment to the United States Constitution.

On appeal, the Indiana Supreme Court reversed the trial court's judgment holding, *inter alia*, that based on its interpretation of the Indiana Constitution, for which it found federal constitutional principles persuasive, Section 17-729(e) does not violate either the Indiana Constitution's equal protection clause or its due process clause.

With respect to the search and seizure proscriptions, the Indiana Supreme Court held that Sections 17-729(j) and 17-727(a)(9) did not contravene either the Indiana Constitution or the Fourth Amendment to the United States Constitution since (i) no criminal prosecutions are authorized under the Ordinance for the refusal to permit inspections, (ii) an advance notice requirement is unreasonable given the ease with which violations could be concealed, (iii) the business being inspected has a history of regulation, (iv) a licensee in a regulated business impliedly consents to inspections at any and all reasonable times, and (v) inspections were limited to business hours and other reasonable times.

The decision of the Indiana Supreme Court was rendered on January 19, 1978. (Appendix A, p. 1a) Appellants filed their notice of appeal in the Indiana Supreme Court on February 3, 1978. (Appendix E, p. 3e) Thereafter, they timely filed a petition for rehearing on February 6, 1978. The Indiana Supreme Court denied the petition for rehearing on March 6, 1978. (Appendix I, p. 1i) No notice of appeal was filed following the denial of the petition for rehearing and the jurisdictional statement was not filed until June 7, 1978.

II.

ARGUMENT.

A. The Appeal to This Court Was Untimely.

The final judgment in the case at bar was not rendered until March 6, 1978. No notice of appeal was filed within 90 days of that judgment. Accordingly, this Court has no jurisdiction to hear the appeal. Under any interpretation of the jurisdictional question, the appeal was not docketed until June 7, 1978, more than 90 days following the rendering of final judgment. Accordingly, it was not timely docketed as required by Rule 13(1) of this Court. In either event, the appeal should be dismissed.

The jurisdictional grant of this Court's authority to review judgments of state courts is found in 28 U. S. C. § 1257 (1970), which provides, *inter alia:*

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

By reason of Rule 11 of the Rules of this Court and 28 U. S. C. § 2101(c) (1970), the notice of appeal pursuant to which the appeal may be taken must be filed within 90 days of the entry of final judgment. Failure to file the notice is a jurisdictional defect requiring dismissal of the appeal. *See, e.g., Taggart* v. *New York,* 392 U. S. 667 (1968); *Territo* v. *United States,* 358 U. S 279 (1959).

In the case at bar, the Indiana Supreme Court entered its judgment on January 19, 1978. A notice of appeal was filed February 3, 1978. In ordinary circumstances, filing of this

notice would have been timely and, assuming docketing of the appeal within 90 days of January 19, 1978, it would have complied with the rules of this Court and the statutory grant of jurisdiction. But thereafter appellants timely filed a petition for rehearing in the Indiana Supreme Court. The authorities are uniform in holding that the effect of such a petition is to "suspend the finality of the state court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parites." *Department of Banking* v. *Pink,* 317 U. S. 264, 266 (1942).

Accordingly, the finality that may have existed at the time of the filing of the notice of appeal on February 3, 1978, was destroyed by appellants' own act of filing a petition for rehearing on February 6, 1978. There was no final judgment from which to appeal until the Indiana Supreme Court disposed of the petition for rehearing on March 6, 1978.[1] Since no notice of appeal was filed following the date of finality and since the 90 days allowed in Rule 11 and 28 U. S. C. § 2101 (1970) have long since passed, the appeal should be dismissed for want of jurisdiction in this Court.

Even if appellants could be considered timely to have filed their notice of appeal, their appeal was not timely docketed and, therefore, should be dismissed. Rule 13(1) of the Rules of this Court provides that a case is to be docketed in this Court not more than 90 days from judgment. Final judgment was rendered on March 6, 1978 (Appendix I), and the 90th day thereafter was Sunday, June 4, 1978. Accordingly, the final date for the filing of the jurisdictional statement was Monday, June 5, 1978. The case was not docketed, however, until June 7,

1. Appellants apparently agree with this analysis of finality. In their jurisdictional statement, they assert: "Issues were closed by the Indiana Supreme Court, and final judgment entered and effective . . . upon denial of petitioner's . . . petition for rehearing. . . ." (J. S. 3) It is from that date that they inaccurately measured the time for docketing.

1978, and even then the jurisdictional statement was defective.[2]

Appellees submit that even though late docketing of an appeal is not a jurisdictional ground for dismissal, the failure to comply with this Court's rules does supply an adequate basis for dismissal. *See, e.g., Hutten* v. *Korzen,* 409 U. S. 905 (1972); *Aero Mayflower Transit Co., Inc.* v. *United States,* 409 U. S. 905 (1972).

No matter how the various pleadings filed by appellants are considered, their appeal was not timely perfected. Appellees submit that the failure to file a notice of appeal within 90 days following the entry of final judgment, *i.e.* within 90 days following denial of appellants' petition for rehearing, leaves this Court without jurisdiction to consider the appeal. Even if there is jurisdiction, the appeal was not timely docketed under Rule 13(1). In either event it should be dismissed.

B. The Indiana Supreme Court in Upholding Section 17-729(e) Did Not Expressly Pass on Any Federal Question and Proscription of Opposite Sex Massages Presents No Substantial Federal Question.

In the trial of this action, the trial court determined that the proscription of opposite sex massages contained in Section 17-729(e) of the Ordinance contravened the due process and equal protection clauses of the Indiana Constitution. On appeal, the Indiana Supreme Court reversed these determinations. Although the appellate court found federal cases persuasive, it undertook exclusively the interpretation of the Indiana Constitution. Moreover, this Court has consistently held that the proscription of opposite sex massages presents no substantial federal question. Accordingly, as to that issue, the appeal should be dismissed.

Rule 16(1)(b) of the Rules of this Court provides, *inter alia,* that this Court will receive a motion to dismiss an appeal from

2. The defective filing is the reason this Court has deemed August 16, 1978, as the date for the filing of appellees' Motion to Dismiss or Affirm.

a state court on the ground that "the federal question sought to be reviewed was not . . . expressly passed on." In the case at bar, neither the Marion County Superior Court nor the Indiana Supreme Court expressly passed on any federal issue relating to opposite sex massages. See Appendix A, pp. 8a-12a; Appendix B, pp. 4b-5b; Appendix C, pp. 4c-5c.

Moreover, even if the Indiana Supreme Court had expressly passed on the Fourteenth Amendment issues, three recent decisions of this Court have dismissed for want of a substantial federal question cases involving precisely the issues sought to be raised by appellants' jurisdictional statement. This Court's dismissals of the appeals in *Smith* v. *Keator,* 419 U. S. 1043 (1974); *Rubenstein* v. *Cherry Hill,* 417 U. S. 963 (1974), and *Kisley* v. *City of Falls Church,* 409 U. S. 907 (1972) have disposed of the appellants' claims that (1) the Ordinance contains an invidiously sex-based classification (J. S. p. 28), (2) it unreasonably abridges the right to pursue a legitimate livelihood (J. S. pp. 23-27), and (3) it creates an impermissible irrebuttable presumption (J. S. pp. 20-27). *See, Colorado Springs Amusements, Ltd.* v. *Rizzo,* 524 F. 2d 571, 576 (CA3 1975). This Court's decision in *Hicks* v. *Miranda,* 422 U. S. 332 (1975) teaches that these dispositions were dispositions on the merits.

Appellants contend that after the dismissals in *Smith* v. *Keator, supra, Rubenstein* v. *Cherry Hill, supra,* and *Kisley* v. *City of Falls Church, supra,* the issue of opposite sex massages was given new life by the Colorado Supreme Court in *City and County of Denver* v. *Nielson,* ..... Colo. ....., 572 P. 2d 484 (1977) (*en banc*). It is urged that the *Nielson* decision has given rise to some inconsistency in the law justifying this Court's accepting jurisdiction in the case at bar. (J. S. p. 14) While it is true the Colorado Supreme Court held unconstitutional the proscription of opposite sex massages, in doing so it did nothing more than interpret its own constitutional provisions "to afford *greater* protections than the Supreme Court of the United States has recognized in its interpretation of the federal counterparts

to state constitutions." *Id.*, 572 P. 2d at 485 (emphasis added). The action of the Colorado Supreme Court, if anything, supports the notion that the Indiana Supreme Court was free to interpret the Indiana Constitution as it wished and that this Court would not interpret the federal constitution to prohibit the kind of proscription contained in 17-729(e).

Whether appellees can constitutionally proscribe opposite sex massages in connection with the licensing of massage parlors has been determined by this Court to be a question not involving a substantial federal question even when the state courts have purported to interpret the Fourteenth Amendment to the United States Constitution. There has been no demonstration of a reason to change this Court's judgment on that issue. Indeed, there is nothing in the record to suggest that in making the determination from which this appeal was taken the Indiana Supreme Court did anything more than construe Indiana's Constitution. Accordingly, this appeal should be dismissed since it fails to present a substantial federal question and since the Indiana Supreme Court did not pass on any federal constitutional issue.

C. The Appeal from the Indiana Supreme Court's Judgment Regarding the Ordinance's Inspection Procedures Should Be Dismissed for Want of a Substantial Federal Question, or the Judgment Should Be Affirmed Since the Question Presented Is So Unsubstantial As Not to Need Further Argument.

Relying principally on *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), appellants contend in this Court, as they did in the Indiana Supreme Court, that the inspection procedures established by the Ordinance contravene the prohibition against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment. Appellants throughout the course of these proceedings have failed to recognize the distinction this Court has drawn between inspections in regulated

industries, as well as those with only civil consequences, and searches in criminal contexts or with criminal consequences. They have, therefore, demonstrated no cogent reason this Court should consider the constitutionality of the inspection procedures.

As the Indiana Supreme Court correctly determined, no criminal prosecutions are authorized for the refusal of a licensed massage parlor operator to permit inspections. Only the license is affected. (Appendix A, p. 15a) Thus any reliance on *Camara, supra*, by appellants is misplaced. In *Camara*, the appellant was charged with a crime for his refusal to allow a warrantless search of his residence, the use of which as a residence allegedly violated an apartment building's occupancy permit. This Court held his prosecution to be prohibited by the Fourth Amendment as applied to the states by the Fourteenth Amendment.

But this Court distinguished *Camara* in a purely civil context in *Wyman* v. *James*, 400 U. S. 309 (1971). In *Wyman*, a welfare recipient was to lose her benefits for failing to allow a caseworker to visit her home. She brought suit in federal district court contending that home visitation was a search in violation of her Fourth and Fourteenth Amendment rights in the absence of a warrant supported by probable cause or valid consent. The district court upheld her contentions, but this Court reversed.

In reversing, this Court drew the following distinction:

> "[E]ach case [*Camara, supra*, and *See* v. *City of Seattle*, 387 U. S. 541 (1967)] arose in a criminal context where a genuine search was denied and prosecution followed.
>
> "In contrast, Mrs. James is not being prosecuted for her refusal to permit the home visit and is not about to be so prosecuted. . . . We have not been told, and have not found, that her refusal is made a criminal act by any applicable New York or federal statute. The only consequence of her refusal is that the payment of benefits ceases. . . . If a statute made her refusal a criminal offense, and if this case were one concerning her prosecution under that statute, *Camara* and *See* would have conceivable pertinency." *Id.*, 400 U. S. at 325.

Similarly, in the case at bar, there is no threatened or available criminal prosecution for refusal to allow the inspections authorized by the Ordinance. The only consequence is that the license may be revoked. Accordingly, *Camara* has no more pertinency to the case at bar than it did to *Wyman* v. *James, supra.*

It is uncontested, indeed appellants concede, that the business of operating massage parlors is one that historically has been regulated. (J. S. 24) It has been recognized by this Court that in a regulated business, the persons engaged in the business accept both the benefits and the burdens of that regulation. *Cf. Almeida-Sanchez* v. *United States,* 413 U. S. 266, 271 (1973).

In *United States* v. *Biswell,* 406 U. S. 311 (1972), this Court sustained a criminal prosecution of a firearms dealer who submitted to the inspection of his premises on the assertion of statutory authority so to do. The inspection revealed two sawed-off rifles which the dealer was not licensed to possess.

The statutory inspection scheme there sustained, as in the case at bar, authorized official entry during business hours. In the context of dealing in firearms, this Court determined that if inspections were to be effective, unannounced, even frequent, inspections were necessary. *Id.,* 406 U. S. at 316. Indeed, the prerequisite of a warrant could frustrate inspection, and the protections to be afforded by a warrant would be negligible. *Id.* Moreover, since dealers engaged in the sale of firearms did so with the knowledge that business records, firearms, and ammunition would be subject to effective inspection, inspections for compliance posed only limited threats to the dealer's justifiable expectations of privacy. *Id.*

No less than in *Biswell,* massage parlor operators know they are in a regulated business and that they will be subjected to inspection. Indeed, they are required to consent to inspections to be licensed. No less than in *Biswell,* the inspection procedures are limited in time, place and scope. No less than in *Biswell,* an inspection procedure must be flexible to force compliance with the Ordinance since violations can so easily be hidden or

stopped. If anything, the inspection procedures authorized by the Ordinance are less objectionable and more reasonable than those upheld in *Biswell* since no criminal prosecution can flow from the refusal to allow inspections.

In short, appellants have demonstrated no reason why this Court should review an inspection scheme that is no more onerous than the one held not violative of the Fourth Amendment in *Biswell.* Accordingly, either their appeal presents no substantial federal question, or the question is so unsubstantial as not to warrant further argument. Accordingly, either the appeal should be dismissed or the judgment affirmed.

III.

CONCLUSION.

For the foregoing reasons, appellees respectfully move this Court either to dismiss this appeal or affirm the judgment of the Indiana Supreme Court.

Respectfully submitted,

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